IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY TO "DEFENDANT TYSON POULTRY, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH REGARD TO PLAINTIFF'S CLAIMS UNDER CERCLA AND RCRA"

The State of Oklahoma ("the State") respectfully submits the following reply to "Defendant Tyson Poultry, Inc.'s Opposition to Plaintiffs' [sic] Motion for Partial Summary Judgment with Regard to Plaintiffs' [sic] Claims under CERCLA and RCRA."[1]

I. The State is entitled to summary judgment on its CERCLA claims with respect to the issues of (1) "hazardous substance," (2) "facility," and (3) "release"

A. There is no genuine issue of material fact that phosphorus in the form contained in poultry waste is a CERCLA hazardous substance

Defendants have highlighted two points in their response to the State's contention that phosphorus in the form contained in poultry waste is a CERCLA hazardous substance. First, Defendants assert that if the State's contention is accepted "every substance containing a phosphorus compound would necessarily be classified as a CERCLA hazardous substance -- including all living organisms, as well as thousands of human food products and all commercial fertilizers." *See* Resp., p. 3, fn. 3. Courts have seen through such hyperbolic argument before, *see, e.g., United States v. Alcan Alum. Corp.*, 990 F.2d 711, 716 (2d Cir. 1993) (rejecting "parade of horribles" that under court's order breakfast cereal, soil and nearly everything else upon which life depends would be a hazardous substance), and this Court should do likewise. In dismissing a similar argument to the one being advanced here by Defendants, the Third Circuit explained:

> The corporate generator, a non-natural person, has added to what nature has already seen fit to provide for the continued existence of various life forms on this planet; that Congress has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable.

United States v. Alcan Alum. Corp., 964 F.2d 252, 260 (3rd Cir. 1992) (citation and quotations omitted.)

[1] This Reply incorporates by reference the State's reply to DKT #2183 (Defendants' statement of disputed facts).

Second, Defendants assert that Chief Judge Eagan's opinion in *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263 (N.D. Okla. 2003), *vacated in connection with settlement*, which concluded that phosphorus in the form contained in poultry waste is a CERCLA hazardous substance, is not persuasive authority because of "the EPA guidance memo and other authorities demonstrating the impropriety of Plaintiffs' [sic] interpretation were not available to Judge Eagan." *See* Resp., p. 3, fn. 4.[2] Neither of these points withstands scrutiny. First, as the State has demonstrated, the EPA guidance memo was the product of an entirely one-sided process that involved only the poultry industry, and therefore it is entitled to no *Skidmore* deference. *See* DKT #1913 at 14-15 & DKT #2062 at 36 fn. 36. And second, Defendants have identified no "other" legal authority since the *City of Tulsa* decision holding directly or indirectly that phosphorus in the form contained in poultry waste is not a CERCLA hazardous substance.

B. There is no genuine issue of material fact that the State has identified proper CERCLA facilities

Defendants have no reasoned legal or factual response to the State's position that the entire IRW is a CERCLA facility. *See* Resp., pp. 3-4. Defendants' position on this issue is nothing but a "thinly veiled attempt[] . . . to avoid responsibility for contamination." *See Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 419 (4th Cir. 1999).[3] As demonstrated in the State's earlier briefing, *see* DKT #1913 at 21-25 & DKT #2062 at 36-37, the caselaw decisively disposes of Defendants' unfounded position. *See, e.g., Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 fn 3 & 1074 (9th Cir. 2006); *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1174 (10th Cir. 2004); *United States v. Township of*

[2] It is important to remember that there is substantial overlap between Defendants here and the defendants in *City of Tulsa*.

[3] In their Response, p. 4, fn. 6, Defendants assert that the State's characterization of the IRW as a single hydrologic unit is "new." It is not. *See, e.g.*, DKT #1913 at 24, fn. 18.

Brighton, 153 F.3d 307, 313 (6th Cir. 1998); *Nutrasweet Co. v. X-L Eng'g Corp.*, 933 F.Supp. 1049, 1417-18 (N.D. Ill. 1996); *Cytec Indus., Inc. v. B.F. Goodrich Co.*¸232 F.Supp.2d 821, 835-36 (S.D. Ohio 2002).

As to the State's alternative contention -- that the grower buildings, structures, installations and equipment, as well as the land to which poultry waste has been applied are CERCLA facilities -- Defendants' response is to assert that the State has not sufficiently identified these facilities. *See* Resp., p. 4. But that assertion is simply factually incorrect. *See, e.g.*, DKT #2062, Facts, ¶¶ 21, 30 & 33.

C. There is no genuine issue of material fact that Defendants cannot establish that the CERCLA fertilizer exception applies

Defendants' attempt to defend their releases of hazardous substances in the IRW by claiming that such releases are immunized by the "normal application of fertilizer" exception, *see* Resp., pp. 1-2 & 4, but nowhere do Defendants establish, as is their burden, the actual applicability of the exception to the approximately 345,000 tons of poultry waste generated annually in the IRW.[4] The mere fact of land applying poultry waste to a field does not automatically trigger the exception. Moreover, Defendants have disclaimed knowledge of where their poultry waste has been land applied in the IRW, how much has been land applied, or the soil test phosphorus for an application location, *see* DKT # 2062, Fact ¶ 40. Without such information Defendants cannot even begin to invoke the exception (assuming arguendo that it could even be established in the IRW, which it cannot).

II. The State is entitled to summary judgment with respect to that portion of its RCRA claim alleging endangerment to the environment from phosphorus

[4] As explained in *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989), "exceptions to CERCLA liability should . . . be narrowly construed," and the general rule is that a party seeking the benefits of a statutory exception bears the burden of proof on the applicability of the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

A. There is no genuine issue of material fact that poultry waste is a RCRA solid waste for purposes of the State's endangerment claim

Defendants assert that (1) RCRA's plain language, (2) judicial treatment, (3) EPA enforcement, and (4) Oklahoma's practices all support the proposition that poultry waste is not a solid waste. *See* Resp., p. 9. None of Defendants' assertions stand up to scrutiny, however.

First, the plain language of the RCRA salutatory definition of solid waste expressly includes "discarded material . . . resulting from . . . agricultural operations . . . ." *See* 42 U.S.C. § 6903(27).[5] While it contains exceptions for other materials (thus demonstrating that Congress knew how to create an exception when it wanted to), contrary to Defendants' assertion, this statutory definition contains *no* exceptions for animal manures returned to the soil as fertilizer or otherwise. *See id.* The statute is the authoritative statement of the law, and resort to the legislative history in an effort to create an exception -- which is precisely what Defendants are

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[5] Defendants have conceded that it is the statutory definition alone -- and not some regulatory definition -- that provides the applicable definition of "solid waste" for purposes of the State's RCRA endangerment claim. *See* Resp., p. 5, fn. 8. After making this concession, however, Defendants promptly ignore it. For instance, on page 8 of their Response, citing to *Advanced Notice of Proposed Rulemaking: Identification of Non-Hazardous Materials That Are Solid Waste,* 74 Fed. Reg. 41 (Jan. 2, 2009) ("ANPR"), Defendants attempt to assign significance to an EPA statement that EPA has the discretion for *regulatory* purposes to determine whether a material is a solid waste even if it is transferred between industries. As this ANPR pertains to the development of a *regulatory* definition of solid waste, which of course -- as Defendants have conceded -- has no bearing on whether poultry waste is a solid waste for purposes of an endangerment claim, the ANPR and its contents are not relevant. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993) ("the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment"). (It is interesting to note, however, that in the ANPR, EPA has listed "Poultry and Egg Production" as one of the categories / entities potentially affected by its action. *See* 74 Fed. Reg. at 41-42.)

Defendants also conveniently ignore their concession on pages 9 and 11 of their Response, wherein they assert that EPA has traditionally not treated animal manures as solid wastes. Again, however, how EPA may or may not treat poultry waste for *regulatory* purposes is entirely different from how courts must treat it for purposes of endangerment claims (*i.e.*, solely with reference to the statute).

arguing this Court should do -- is not permitted.[6] *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337 (1994).

Second, contrary to Defendants' assertion, the caselaw clearly demonstrates that a material is discarded where it is not destined for beneficial reuses or recycling in a continuous process by the generating industry itself. *See* DKT #2062 at 39-42. Defendants' efforts to distinguish *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993), and *Owen Elect. Steel Co. of South Carolina, Inc. v. Browner*, 37 F.3d 146 (4th Cir. 1994), *see* Resp., pp. 6-7, are illusory and unavailing. Moreover and significantly, in their Response, Defendants do not even attempt to distinguish *American Mining Cong. v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*"), and *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004). *AMC II* highlights the principle that in order to avoid being deemed discarded, a material must be immediately reused. *See AMC II*, 907 F.2d at 1186. As discussed below, poultry waste is not being immediately reused.

Safe Air is particularly noteworthy in that it is an agricultural case that sets out the factors to be considered in evaluating whether a material is "discarded":

> Considering these extra-circuit cases to be persuasive in identifying relevant considerations bearing on whether grass residue is "solid waste" under RCRA, we will also evaluate: (1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," *AMC I*, 824 F.2d at 1186; (2) whether the materials are being actively reused, or whether they merely have the potential of being reused, *AMC II*, 907 F.2d at 1186; (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer, *ILCO*, 996 F.2d at 1131.

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[6] In any event, a close read of the committee report Defendants rely upon for the so-called "manure exception" reveals that it does not support Defendants' argument. The report states as follows: "Agricultural wastes which are *returned to* the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation." H.R. Rep. No. 94-1491, 2d Sess. at 2 (emphasis added). Poultry waste indisputably does not originate from the IRW soil, so by definition it cannot be "returned to" the IRW soil. Thus, this legislative history is simply irrelevant to poultry waste.

Safe Air, 373 F.3d at 1043. Applying these factors here establishes that poultry waste is discarded. First, poultry waste has no further role in the poultry growing process; it is not reused or recycled in the poultry growing industry itself.[7] Second, poultry waste is not actively or immediately reused. Clean-outs of poultry waste from poultry houses generally occur less than once a year. And third, poultry waste is not being used by its original owner -- *i.e.*, Defendants.[8]

Further, the caselaw does not support Defendants' efforts, *see* Resp., p. 5, to engraft additional factors onto the "discarded" analysis. First, Defendants assert that the Court should consider whether the material has been put to "beneficial use." Beneficial reuse, however, is a factor only when the material is destined for such reuse "in a continuous process by the generating industry itself." *See Safe Air*, 373 F.3d at 1043 (citation omitted). Second, Defendants assert that the Court should consider whether the material has "market value," but the courts have flatly rejected this position. *See Safe Air*, 373 F.3d at 1043 fn. 8 ("the issue of monetary value does not affect the analysis of whether materials are 'solid waste' under RCRA"); *ILCO*, 996 F.2d at 1131. And third, Defendants assert that the Court should consider whether there was an "intent" to discard the material. The caselaw, however, does not support reading an intent requirement into the definition of "discard." Regardless, the purpose of a poultry house

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[7] Defendants' assertion that poultry waste "*is* reused within the same agricultural industry that creates it," *see* Resp., p. 8 fn. 10 (emphasis in original), is not true. The industry that creates poultry waste is the poultry industry, not the cattle industry. Poultry waste is not used, let alone reused, to grow poultry. Moreover, as discussed *infra*, whether poultry waste has value does not enter into the analysis of whether it is a solid waste.

[8] Defendants attempt to take issue with the State's discussion of *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003). Unlike the material at issue in that case, however, the differences between poultry waste and commercial fertilizer are not, from a perspective based on health and environmental risks, "so slight as to be substantially meaningless." *Id.* at 1270. Nowhere in their Response do Defendants dispute this point, and thus *Safe Food* does not advance Defendants' arguments.

clean out is to get rid of the poultry waste.[9] *See, e.g.*, *ILCO*, 996 F.2d at 1131-32 ("*Somebody* has discarded the battery in which these components are found. This fact does not change just because a reclaimer has purchased or finds value in the components") (emphasis in original).

Third, contrary to Defendants' assertion, EPA enforcement practice with respect to endangerment claims -- to wit, the *Seaboard* case -- demonstrates that the agency views animal waste as a solid waste. Defendants first attempt to dismiss the *Seaboard* case on the ground that it "was not filed by EPA, but by the Department of Justice." *See* Resp., p. 10. But DOJ routinely files and prosecutes civil actions on behalf of the EPA.[10] *See, e.g.*, 28 U.S.C. §§ 514, 516 & 519.

Defendants next try to distinguish *Seaboard* by describing the complaint as EPA's "litigating position," arguing that it is therefore not entitled to deference. Defendants' argument is illogical, as whether the EPA views animal waste as a solid waste in the context of an endangerment claim (which is defined with reference to the statute and not with reference to any regulation) by definition *only* comes up in the context of litigation. Notably, Defendants have identified no instance when EPA has taken a contrary position with regard to animal waste in an endangerment claim. In short, this is just another example of Defendants improperly attempting -- despite their concession on the point -- to conflate EPA regulation with the RCRA statute.

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[9] Defendants' hyperbolic argument that the State's interpretation of "discard" would reach any material transferred between industries (*e.g.*, "the manufacture of raw chemicals, the supply of food ingredients, and even the creation of packing and shipping supplies"), *see* Resp., p. 8, is easily dispatched. The test articulated by the courts and relied upon by the State here applies to used materials and secondary or by-product materials.

[10] The filing of the *Seaboard* complaint was not the act of an assistant United States attorney acting alone. The *Seaboard* complaint was signed by the Assistant Attorney General for the Environmental and Natural Resources Division at the Department of Justice *and* by an attorney in the Environmental Enforcement Section of that division. Moreover, listed as "of counsel" in the complaint are an attorney in the Special Litigation and Projects Division in the Office of Enforcement and Compliance Assurance of the EPA *and* an attorney in the Office of Regional Counsel, Region 6, of the EPA. Thus, there can be no question that this case clearly reflected the views of the EPA with respect to animal manure being a solid waste for purposes of a RCRA endangerment claim.

And fourth, contrary to Defendants' assertion, whether Oklahoma regulates poultry waste under its solid waste program is simply not relevant in the context of an endangerment claim. Here again Defendants ignore their concession that an endangerment claim is not based upon any regulatory scheme and that it is the statutory definition that provides the operative analytical framework for determining whether poultry waste is a solid waste. At any rate, the law is well-established that an endangerment claim "is not superseded by a state program," *see Eckardt v. Gold Cross Serv., Inc.*, 2006 U.S. Dist. LEXIS 65831, *7-8 (D. Utah Mar. 28, 2006) (collecting cases); *see also Dague v. City of Burlington*, 935 F.2d 1343, 1352-53 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992), and therefore Defendants' argument fails.

In sum, the State is entitled to summary judgment to poultry waste is a "solid waste."

B. There is no genuine issue of material fact that Defendants are "contributors" for purposes of the State's endangerment claim

Defendants' assertion that in order to establish "contributor" liability under RCRA the State must prove Defendants "control" the handling and disposal of the poultry waste, *see* Resp., pp. 11-12, has no basis in the law. *See United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) ("We also disagree with the district court's conclusion that an explicit allegation of "control" is required [to find 'contributing to' liability]"); *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995) ("it is not necessary that a party have control over the ultimate decisions concerning waste disposal or over the handling of materials at a site in order to be found to be a contributor within the purview of RCRA"). All the State need demonstrate is that Defendants' actions "have a part or share in producing an effect." *See Cox v. City of Dallas, Texas*, 256 F.3d 281, 294-95 (5th Cir. 2001). While obviously not boundless, this standard is to be construed more liberally and broadly than traditional common law concepts of proximate cause. *See* S. Rep. No. 96-172 (1980). And it is a standard that the State has easily satisfied.

See DKT #2062 at pp. 44-47 (demonstrating that Defendants "have a part or share in producing" not only the enormous volumes of poultry waste, but also the circumstances under and manner in which that poultry waste is handled and disposed of in the IRW).[11] As such, the State is entitled to summary judgment on Defendants' "contributor" liability.

C. There is no genuine issue of material fact that phosphorus from land-applied poultry waste may present an imminent and substantial endangerment to the IRW environment

With respect to whether there is a genuine issue of material fact that phosphorus from land-applied poultry waste may present an imminent and substantial endangerment to the IRW environment, Defendants assert that "Plaintiffs [sic] still have no evidence linking phosphorus in surface waters to orthophosphates in poultry litter." *See* Resp., p. 15. Defendants' assertion is not credible. The evidence linking land applied poultry waste to the phosphorus in the waters of the IRW is overwhelming.[12] The USDA, *see* DKT #2080; DKT #2084; DKT #2101, the USGS, *see* DKT #2100; DKT #2102, the Office of the Oklahoma Secretary of the Environment, *see* DKT #2102-4, and the Arkansas Natural Resources Commission, *see* DKT #2102-5 & #2102-6, have all found that phosphorus from land applied poultry waste is running off into waters of the IRW. A host of non-retained experts, *see, e.g.*, DKT #2088-11; DKT #2100-5; DKT #2103-2; DKT #2103-3, as well as the State's retained experts, *see* DKT #2103-10; DKT #2076-2; DKT

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[11] Defendants bald assertion that the State has not identified company-specific evidence that each Defendant is a "contributor," *see* Resp., p. 13, is belied by the comprehensive defendant-by-defendant evidence set forth in the State's Motion. *See* DKT #2062 at ¶¶ 6-17, 24, 28 & 32-34.

[12] Defendants' efforts to equate the State's current evidence with the evidence presented at the preliminary injunction hearing nearly a year and a half ago should not be credited. As the briefing now before the Court reflects, the State's evidence with respect to all aspects of its case is significantly more robust than it was then. *See Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (noting that evidence at a preliminary injunction hearing is typically less complete than in a trial on the merits). In any event, the present motion deals with environmental endangerment from phosphorus, not health endangerment from bacteria.

#2103-7, have also concluded that phosphorus from land applied poultry waste is running off into waters of the IRW. Even Defendants admit -- everywhere but here -- that phosphorus from land applied poultry waste is running off into waters of the IRW. *See* DKT #2081-5; DKT #2081-6. The undisputable facts clearly demonstrate more than "hypothetical risk under the right circumstances" that phosphorus from poultry waste runs off into the waters of the IRW. *See* Resp., p. 15.[13] Phosphorus from poultry waste *is* running off into the waters of the IRW and endangering the environment. Under *Burlington Northern & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013 (10th Cir. 2007), summary judgment in favor of the State is thus warranted.

III. Conclusion

WHEREFORE, the Court should grant the State partial summary judgment against Defendants on each of those aspects of its CERCLA and RCRA claims moved upon in DKT #2062.

[13] Defendants argue that the State has not accounted for other sources of phosphorus in the IRW. *See* Resp., p.15. This is incorrect. The State has never contended, and the State need not prove, *see Tyson Foods*, 565 F.3d at 778-79, that land-applied poultry is the sole source of the phosphorus in the waters of the IRW. Regardless, the State's evidence does reflect a quantitative evaluation of contributions from poultry waste to the waters of the IRW. *See, e.g.*, DKT #2084 (USDA (July 2006), p. 40) ("due in large part"); DKT #2101 (USDA (March 16, 1992), p. 32) ("[a] significant part"); DKT #2100 (USGS (2006), p. 4) ("probably substantial sources"); DKT #2102-4 (Office of the Oklahoma Secretary of the Environment (2007 Update), p. 4) ("[t]he single largest contributor"); DKT #2102-5 & #2102-6 (Arkansas Natural Resources Commission (Oct. 1, 2005), p. 10.1) ("primarily"); DKT #2088-11 (Chaubey Dep., p. 192) ("significant amount"); DKT #2100-5 (Smolen Dep., pp. 138-39) ("the number one source"); DKT #2103-2 (Derichsweiler Dep., p. 56-57 & 60) ("the largest contributor"); DKT #2103-3 (Young Dep., p. 209-10) ("a significant part"); DKT #2100-3 (Connolly Dep., pp. 221-26) ("significant portion"); DKT #2103-7 (Engel Dep., pp. 131-32) ("a significant contributor"); DKT #2076-2 (Fisher Dep., pp. 113-17) ("the overwhelmingly dominant contributor"); DKT #2103-10 (05/15/09 Olsen Aff., ¶ 5-6) ("the dominant source").

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I hereby certify that on this 19th day of June, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Also on this 19th day of June, 2009 I mailed a copy of the above and foregoing pleading to:

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